

Senate Committee on Environment and Public Works
Hearing entitled, “Hearing on Nominations”
March 11, 2020
Questions for the Record for Mr. Benevento

Ranking Member Carper:

1. When you led the Colorado Department of Public Health, you included environmentally beneficial projects -- known as supplemental environmental projects (SEPs) -- in enforcement settlements. For example, you oversaw two water quality enhancement projects involving the City of Colorado Springs, and you even issued a statewide policy in 2003 to encourage SEPs. At the federal level, SEPs have been supported by administrations of both parties in nearly 3,000 cases over the past 30 years.

Do you, as a matter of policy, support including SEPs in both administrative and judicial cases, and with state and local defendants, and will you encourage their use if confirmed?

I appreciate that Supplemental Environmental Projects (SEPs) have reduced emissions or exposures in communities impacted by environmental violations. However, in a memorandum dated March 12, 2020, Jeffrey Bossert Clark, Assistant Attorney General for the U.S. Department of Justice’s Environment and Natural Resources Division, announced a new policy prohibiting the inclusion of SEPs in civil judicial consent decrees and settlement agreements, on the basis that SEPs violate the Miscellaneous Receipts Act (MRA), which requires that penalties be deposited in the U.S. Treasury and not diverted for other purposes.

In light of DOJ’s new memorandum, EPA will no longer include SEPs in settlement agreements, with the exception of diesel emission reduction SEPs, which were specifically authorized by Congress. The new DOJ memorandum also does not preclude a settlement that includes a state only SEP, in cases involving state co-plaintiffs. Such SEPs do not implicate the MRA.

2. During your confirmation hearing on March 11, 2020, you touted the benefits of an October 2018 Memoranda of Agreement (MOA) with the State of Wyoming¹ that you signed as Regional Administrator to promote the use of the state’s self-audit law, and you described how the MOA can serve as a model for other states. Although you correctly noted that self-auditing can be a valuable supplement to limited government enforcement resources that cannot detect every possible violation, you did not mention that EPA has had a self-audit policy for 25 years that – like Wyoming’s law – waives civil penalties if regulated facilities detect, report, and fix their violations.

Instead, you expressed concern with an uncertain federal response to self-reported violations. You warned that “what is always looming out there, though, from a state

¹ https://www.epa.gov/sites/production/files/2018-10/documents/wyoming_audit_moa_-_final_version_for_signature_-_october_15_2018.pdf

official perspective is what will EPA do . . . EPA always has the ability to overfile or to come and take additional action” which “tends to damper a regulated facilities willingness to come forward if they don’t know what EPA is going to do.” You asserted that “EPA over the years has been hit or miss about whether they will accept a state’s decision to waive penalties or not.”

You explained that the Wyoming self-audit is designed to ensure that certainty for the regulated entity” such that if the state follows its own law, EPA will not assess additional penalties. You justified this approach by noting that since the self-audit MOA was entered into, Wyoming “has seen an increase in the number of facilities that are actually going out and looking for issues in their operations and fixing them, and the environmental benefit to the state of Wyoming has been great, so great that North Dakota also signed an MOU and there are several other states that are also looking at it.”²

Please respond to the following, for the time period January 20, 2017, to the date of your response unless otherwise specified:

- a. The number of each year’s overfilings since January 1, 2013, with “overfiling” meaning the initiation of a formal federal enforcement action seeking penalties or injunctive relief after the conclusion of a state enforcement action involving the same violations. For each overfiling case, please include:
 - i. Case Name
 - ii. Facility location(s)
 - iii. Statute(s)
 - iv. Identity of the federal violations that duplicated the state violations
 - v. Whether the violations were reported pursuant to a state self-audit law
- b. Identify and provide a copy of any other State-EPA agreements or understandings, including but not limited to the self-audit context, that EPA either has entered into or that EPA is developing, that discuss the state-federal relationship in enforcing environmental laws.
- c. Provide a copy of any methodologies and data that EPA or states, including but not limited to Wyoming and North Dakota, have developed to measure:
 - i. any increased participation in state self-audit programs
 - ii. the environmental benefits of state self-audit programs
 - iii. the environmental compliance rates in state self-audit programs.

The EPA has a longstanding policy of working cooperatively with its state partners. See Memorandum from William D. Ruckelshaus, Administrator, EPA Policy on Oversight of Delegated Environmental Programs (Apr. 4, 1984). In October 2018

then-Acting Administrator Wheeler issued a memorandum as a complement to the 1984 policy, and to modernize its practices and ensure comprehensive, consistent and constructive approaches to the oversight of programs implemented by states and tribes. *See Memorandum from Andrew R. Wheeler, Acting Administrator, Principles and Best Practices for Oversight of Federal Environmental Programs Implemented by States and Tribes (Oct. 30, 2018).* In addition, the Office of Enforcement and Compliance Assurance issued a memorandum in July 2019 on working cooperatively with states in civil enforcement and compliance assurance work. *See Memorandum from Susan Parker Bodine, Assistant Administrator, Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work (July 11, 2019).*

I am not aware of any instances since January 2013, in which the EPA “overfiled” on a state enforcement action. This statement is based on a staff search of the EPA’s Integrated Compliance Information System (ICIS) which tracks if a civil judicial case is an overfile of a state action, and an informal survey of enforcement managers.

Since January 2017, as noted in my testimony, the EPA has entered into separate Memoranda of Agreement (MOAs) with Wyoming and North Dakota to establish procedures and policies for administration of the audit privilege and immunity laws in those states. Under those agreements, the EPA recognizes that the States’ self-audit laws and policies encourage greater compliance with laws and rules protecting public health and the environment. The EPA is in discussions with some other states as well regarding entering into similar memoranda of agreement. Information about state audit privilege and immunity laws and self-disclosure laws and policies, including earlier MOAs, is available at <https://www.epa.gov/compliance/state-audit-privilege-and-immunity-laws-self-disclosure-laws-and-policies>.

Beyond MOAs related to state self-audit laws, the EPA regions enter into agreements with states regarding enforcement via different mechanisms. For example, some regions negotiate Performance Partnership Agreements with each of the states in their geographic boundaries to spell out expectations and commitments for the grant funds that the EPA provides the states, which can cover enforcement. Since PPAs are renewed on a regular basis (every 1, 2 or 3 years), Regions 1, 5, 8 and 10 and their state partners have renewed their PPAs since January 20, 2017. These documents are voluminous and include only a few paragraphs on enforcement. Here is a link to the Illinois PPA so you can see the enforcement language on pages 5-6. https://www2.illinois.gov/epa/about-us/Documents/FINAL_FY18_19_PPA.pdf

Other regions enter into a Memorandum of Understanding or Agreement with each of the states in their geographic boundaries to provide a vehicle to memorialize the respective commitments of the EPA and the state to protect human health and the environment. Since January 20, 2017, Region 2 has entered in MOAs with NY, NJ, PR and the VI for the UST/LUST program; Region 4 entered into an MOU with

Florida regarding implementation of EPCRA and the use of SEP Policy; and Region 3 is developing an MOU with Virginia and West Virginia.

Finally, from a national perspective, the EPA generally considers a state's audit program when it is reviewing a state's delegated program to ensure that it continues to be adequate. The EPA has not sought data to measure the success of state audit programs. Generally, we are not familiar with all the methods by which states may track participation in their own self-audit programs. The MOUs with Wyoming and North Dakota include a commitment by the state to develop a methodology to measure increased participation and compliance benefits related to the state self audit program. Attached is a report that the Wyoming Department of Environmental Quality sent to the Joint Minerals, Business and Economic Development Committee of the state legislature about FY18-19 participation in its program. The North Dakota MOU was signed on October 7, 2019, less than a year ago. Accordingly, we do not yet have any North Dakota data.

3. Throughout the Trump Administration, EPA has failed to provide adequate responses to dozens of requests for information and documents from myself and other Democratic Senators. Please provide complete responses to the following letters, which are a sub-set of the outstanding requests made of the Agency:

- a. October 9, 2018: Letter to then Acting Administrator Wheeler on litigation costs, signed by Senators Carper, Cardin, Sanders, Whitehouse, Merkley, Markey, Gillibrand, Booker, Duckworth, and Van Hollen.

We look forward to continuing to work with your staff to provide a response and any additional information as appropriate.

- b. November 15, 2018: Letter to then Acting Administrator Wheeler on the Clean Air Scientific Advisory Committee, signed by Senators Carper, Whitehouse, Markley, Hassan, Warren, Merkley, Gillibrand, Van Hollen, Wyden, Blumenthal, Harris, Booker, Shaheen, Hirono, Duckworth, and Schatz.

We look forward to continuing to work with your staff to provide a response and any additional information as appropriate.

- c. June 3, 2019: Letter to Administrator Wheeler on Section 401 of the Clean Water Act, signed by Senators Carper, Booker, and Duckworth.

The Agency provided a comprehensive response on September 26, 2019. We look forward to continuing to work with your staff to provide any additional information as appropriate.

4. Do you agree to provide complete, accurate and timely responses to new requests for information submitted to you by any Member of the Environment and Public Works Committee? If not, why not?

Yes. I commit to providing responses to requests for information as appropriate and in accordance with any applicable statutes or regulations.

5. In responding to oversight letters, will you commit to providing me with materials responsive at the same time or earlier than they are provided to House Committee Chairs or Freedom of Information Act (FOIA) requestors? If not, please explain why not.

Yes. I commit to providing responses to requests for information as appropriate and in accordance with any applicable statutes or regulations.

6. On December 3, 2019, EPA published a proposed rule³ that would modify EPA's Environmental Appeals Board (EAB) procedures in ways that will change nearly 30 years of practice rules governing EPA's administrative litigation program. The proposed rule, *Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals*, focuses on the permit appeals process, but it also would allow the General Counsel to "issue a dispositive legal interpretation in any matter pending before the EAB or on any issue addressed by the EAB" thereby also impacting administrative enforcement appeals. Some commenters, including the Harvard Law School's Environmental & Energy Law Program⁴ express concern that the proposal would "diminish the independence of the EAB and politicize the appeals process" by removing decision-making authority from senior career officials and vesting it in political appointees.⁵

- a. Please provide any notes, record, emails, or other documents since January 20, 2017, between EPA political officials, including but not limited to Andrew Wheeler, Doug Benevento, and Matthew Leopold and outside parties, including but not limited to Bill Wehrum (or his former colleagues at Hunton Andrews Kurth) and Jeff Holmstead (or his colleagues at Bracewell), concerning the development or consideration of EPA's proposed rule.

As documents responsive to your request are identified, we will provide information as appropriate to you on a rolling basis as they become available. I recognize the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions and I committed to continuing to work with your staff on how best to accommodate the Committee's interests.

³ <https://www.govinfo.gov/content/pkg/FR-2019-12-03/pdf/2019-24940.pdf>

⁴ <https://eelp.law.harvard.edu/>

⁵ <https://eelp.law.harvard.edu/2019/12/updates-to-the-environmental-appeals-board-procedures/>

- b. In establishing 12-year term limits for EAB judges (with no guarantee of renewal), identify the earliest dates upon which the three current career civil service judges could be required to vacate the bench if the proposal is finalized.

As members of the Senior Executive Service (SES), EAB judges are always subject to reassignment to any other SES position in the Agency for which they qualify, after approval from OPM and the Office of Presidential Personnel. See 5 U.S.C. § 3395 (“Reassignment and transfer within the Senior Executive Service”); 5 C.F.R. § 317.901; see also Guide to the Senior Executive Service, published by the Office of Personnel Management (March 2017), pages 8, 10. <https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf>. The proposal for 12-year terms is not a separate condition applied to SES employees. It simply provides transparency regarding a mechanism by which the Administrator could exercise his or her authority consistent with the applicable SES procedures.

Under the proposal, the date on which current EAB judges would up for renewal is set based on seniority. Under this proposal, the terms of each EAB judge are renewable. Each seat on the EAB would be designated a number based on the seniority of the Board’s current members. The seat of the longest serving judge would be designated as seat one, the second longest serving judge as seat two, the third longest serving judge as seat three, and the most recent judge as seat four. The term for the newly designated seat one would end three years after the effective date of the final rule. The process would then continue at three-year intervals, with seat two ending six years after the effective date, seat three ending nine years after the effective date, and seat four ending twelve years after the effective date. Thereafter, all terms will last for twelve years.

7. If you are confirmed, will you commit to protect the rights of all Environmental Protection Agency career employees to make lawful disclosures, including their right to speak with Congress?

Yes.

8. For decades, both Republican and Democratic administrations alike have had written policies limiting White House contacts with agencies that have investigatory and enforcement responsibilities. These policies have recognized that even a simple phone call from the White House to an agency inquiring about or flagging a specific matter can upset the evenhanded application of the law.

- a. Do you agree that it is essential that in making decisions, EPA enforcement officials must be shielded from political influence and spared even the appearance of being subject to political influence or considerations?

Congress vested most of EPA's enforcement authorities in the EPA Administrator and those authorities have been delegated further to the Assistant Administrator for the Office of Enforcement and Compliance Assurance and to Regional Administrators, and some have been further delegated, as appropriate. Persons with delegated enforcement authority are of course subject to management oversight. I agree that the White House should not inappropriately influence case specific enforcement matters.

- b. Will you commit to notifying this Committee within one week if any inappropriate communications on cases specific enforcement matters from White House staff to EPA staff, including you, occur?

I commit to quickly take all appropriate steps if an inappropriate communication on a case specific enforcement matter is brought to my attention.

9. Please provide me with a copy of the economic analysis of the Kennedy-Carper bill to phase down HFCs that EPA has prepared. While you stated during the hearing that this analysis "is still under review; it is not yet complete," that is not accurate. The analysis has been complete for some time, and demonstrates that the bill would result in \$3.7 billion in consumer savings over 15 years.

Any analysis of costs and benefits by EPA is still undergoing review and includes information that relates to a pending or contemplated executive action and is therefore deliberative and pre-decisional.

10. During the hearing, when I asked whether EPA would follow the terms of the Clean Air Act as they pertain to the interagency review of the draft final Safer Affordable Fuel Efficient (SAFE) Vehicles Rule, you stated "Yes, we will follow the Clean Air Act". Section 307 of the Clean Air Act states that "The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation."
 - a. EPA has provided DOT with a hard copy of its comments on the DOT-authored draft final rule, but has not submitted an electronic copy for interagency review. Please confirm that the appropriate EPA staff in the Office of Air and Radiation have been instructed to submit those materials to the docket as is required under the law. Please also indicate which EPA official has been provided with this direction.

- b. DOT recently uploaded 187 pages worth of its draft final Environmental Impact Statement to the docket for interagency review, and EPA is preparing feedback on those materials. Please confirm that the appropriate EPA staff in the Office of Air and Radiation have been instructed to submit those materials to the docket when they are completed, as is required under the law. Please also indicate which EPA official has been provided with this direction.
- c. Please confirm that the appropriate EPA staff in the Office of Air and Radiation have been instructed to submit copies of all other feedback it provides to DOT or other federal officials on the SAFE Vehicles Rule to the docket prior to the finalization of the rule. Please also indicate which EPA official has been provided with this direction.

EPA and DOT are working together to promulgate the SAFE Vehicles rule jointly pursuant to their overlapping statutory obligations and authorities. EPA and DOT have continued this joint approach to setting standards first used by the previous Administration in its 2012 joint rulemaking. This joint approach is consistent with the law and with the Supreme Court’s direction in *Massachusetts v. EPA* (2007) that EPA and DOT should “administer their obligations” in a manner that “avoid[s] inconsistency.” As with all of EPA’s rulemaking efforts, the Agency will comply with applicable statutory requirements.

11. During the hearing, in relation to several tweets written by EPA’s incoming chief of staff, I stated that “with the death of our late colleagues, John McCain, I am the last Vietnam veteran serving in the U.S. Senate. I served five years, three tours over there, during a hot war in Southeast Asia. The names of 56,000 people with whom I served that are dead that are on a wall down by the Lincoln Memorial. Comments like the one from this chief of staff conflating climate action with communism aren’t just intellectually baseless, they are dishonest. They are reprehensible, especially when you consider the military service record of our commander in chief during that same period of time.”

- a. Do you agree with the incoming chief-of-staff’s March 11, 2020 tweet which said that “ban and control democrats” want to put American energy workers “out of business”? Do you think the language used in this tweet is appropriate coming from an incoming political appointee of any seniority or political party?

I am unfamiliar with the tweet you referenced; and therefore, cannot provide a comment on it.

- b. Do you agree with the incoming chief-of-staff's February 23 2019 tweet which said that "The looney left has lost their minds. Now they want to implement a Soviet-styled takeover of our energy and our economy. It didn't work in Venezuela and won't work here. It's time for us to join together and stop their radical agenda." Do you think the language used in this tweet is appropriate coming from an incoming political appointee of any seniority or political party?

I am unfamiliar with the tweet you referenced; and therefore, cannot provide a comment on it.

- c. Do you agree with the incoming chief-of-staff's March 9, 2019 tweet which said that "the Soviet Union. Venezuela. They both went bust when they ran out of other people's money to spend, But today's radicals in Washington won't let facts get in the way of their socialist agenda. We won't let the Green New Deal destroy America's economy." Do you think the language used in this tweet is appropriate coming from an incoming political appointee of any seniority or political party?

I am unfamiliar with the tweet you referenced; and therefore, cannot provide a comment on it.

- d. Do you agree with the incoming chief-of-staff's March 7, 2019 tweet which said that "The #GreenNewDeal reads like a Karl Marx wishlist that would devastate the American economy. The fact that mainstream 2020 Democratic candidates are embracing it is scary."

I am unfamiliar with the tweet you referenced; and therefore, cannot provide a comment on it.

- 12. On February 5, 2019, Senator Whitehouse and I sent a letter, along with a request for records, to Administrator Wheeler regarding interactions that EPA has had with the Environmental Council of the States (ECOS) within the past six months. To summarize our concerns, last summer, California and four automakers announced a voluntary agreement on vehicle greenhouse gas emissions. In response, the Trump Administration sent California two environmental enforcement letters that appeared to be both retaliatory and motivated by President Trump's tweets about the state. On September 26, 2019, ECOS sent Administrator Wheeler a letter criticizing EPA for its actions against California. We have received reports indicating that EPA political leaders took offense to this letter and in response took a number of retaliatory steps against ECOS.

- a. My office has heard from multiple sources that you personally threatened to withhold or delay ECOS's EPA grant funding until ECOS either retracted its statement criticizing EPA or issued a new statement highlighting the cooperation between EPA and ECOS and its members. Is this true?

The Agency has responded to this question, as detailed in the March 6, 2020 letter from EPA's Office of Congressional and Intergovernmental Affairs Associate Administrator Joseph Brazauskas. The Agency has a strong relationship with state leaders and continues to work with states on both policy and implementation. The EPA did not engage in any retaliatory action towards ECOS.

- b. Earlier this week, we received a partial response to our letter along with an initial production of responsive documents. Among the requested records that we have yet to receive is a listing of all financial disbursements that EPA has delivered to ECOS under the EPA-ECOS Cooperative Agreement, which includes the amounts disbursed, the dates the disbursements were made, and the project description for each disbursement, for each of the past three fiscal years. Please provide those records, along with any other outstanding responsive records that we requested in our February 5 letter.

As additional documents responsive to your request are identified, we will provide information as appropriate to you on a rolling basis as they become available. I recognize the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions and I committed to continuing to work with your staff on how best to accommodate the Committee's interests.

- c. According to your calendar, on Friday, October 4, 2019, from 10:30am to 11:00am, you organized a meeting with a subject line "ECOS Grant."
 - i. Please describe in detail the discussion that occurred in this meeting, including the purpose and goals of the meeting, any decisions that were made at this meeting, and any actions items that were assigned out of this meeting.

We discussed ECOS grants and approved an ongoing grant.

- ii. Why did you feel that the subject of an ECOS Grant was important enough for you to call a meeting to discuss it? If your duties regularly require you to review individual grant awards, please provide other examples of meetings you have called where the sole subject is a single grant or a set of grants to an individual recipient.

My duties include operational activities inside the Office of the Administrator, including approving specific travel and

conferences. I have regular meetings to approve these activities as well as personnel actions across the Agency. The Office of Congressional and Intergovernmental Affairs, which is part of the Office of the Administrator, manages the coordination and approval of ECOS grants. Authority to provide grants to ECOS was given to EPA by Congress without any criteria. Therefore, senior review of how this grant is disbursed is appropriate.

- iii. In addition, please provide all records related to this meeting within your possession, along with any records related to this meeting within the possession of Robin Richardson, Melissa Saddler, Andrea Barbary, Brittany Carter, and Travis Voyles, all of whom were invited to attend this meeting according to your calendar entry.

As additional documents responsive to your request are identified, we will provide information as appropriate to you on a rolling basis as they become available. I recognize the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions and I committed to continuing to work with your staff on how best to accommodate the Committee's interests.

- iv. Did any non-EPA employees attend this meeting? If so, please provide their names and affiliations.

No.

- d. There also exists a calendar entry for Thursday, November 14, 2019 from 1:30pm to 2:30pm, which lists as its subject line "ECOS/ITRC Proposed Project Review." The entry shows that you organized this meeting.

- i. Please describe in detail the discussion that occurred in this meeting, including the purpose and goals of the meeting, any decisions that were made at this meeting, and any actions items that were assigned out of this meeting.

I am not certain this meeting occurred. While it is on my schedule, I have no recollection of that meeting.

- ii. In addition, please provide all records related to this meeting within your possession, along with any records related to this meeting within the possession of Robin Richardson, Melissa Saddler, Andrea Barbary, Megan Garvey, and Carrie Coxen, all of whom were invited to attend this meeting according to your calendar entry. Please include the "background materials" and "summary level

information we'll provide in advance" referenced in the notes of the calendar entry.

I have no records related to that meeting. As additional documents responsive to your request are identified, we will provide information as appropriate to you on a rolling basis as they become available. I recognize the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions and I committed to continuing to work with your staff on how best to accommodate the Committee's interests.

- e. There also exists a calendar entry on Thursday, November 14, 2019, from 12:00pm to 12:45pm, (Immediately before the ECOS/ITRC review meeting), which lists as its subject line "California SIP Backlog." The entry shows that you organized this meeting.
 - i. Please provide an unreacted copy of this calendar entry (other than any personally identifiable information).

The meeting on Thursday, November 14, 2019, from 12:00pm to 12:45pm with subject line "California SIP Backlog" was to discuss the management of California's state implementation plan (SIP) backlog. The only portions redacted from that entry are the conference call in number and the meeting description: "To discuss how we are managing the California SIP backlog; discuss plan and progress we are making on reducing the California SIP backlog."

- ii. Please describe in detail the discussion that occurred in this meeting, including the purpose and goals of the meeting, any decisions that were made at this meeting, and any actions items that were assigned out of this meeting.

The meeting was a discussion of the state of California's state implementation plan (SIP) backlog and how the Agency is managing that backlog.

- iii. In addition, please provide all records related to this meeting within your possession, along with any records related to this meeting within the possession of Michael Stoker, Megan Garvey, Carrie Coxen, Cory Preston, Elizabeth Adams, Charles Munoz, Christopher Hage, Deborah Joran and David Harlow, all of whom were invited to attend this meeting according to your calendar entry.

As documents responsive to your request are identified, we will provide information as appropriate to you on a rolling basis as they become available. I recognize the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions and I committed to continuing to work with your staff on how best to accommodate the Committee's interests.

- f. In addition to potentially withholding grants funds from ECOS in retaliation for their letter that criticized EPA's actions, press reports have said that EPA recalled one its employees who was detailed to ECOS. Is this true? On what date was the employee a) expected to return to EPA per the terms of his detail and b) informed that his detail had ended?

The detail was for April 2019-April 2020. Due to increased workload at the agency, EPA staff was brought back at the end of November.

Senator Cardin:

13. In its draft **commentary**, EPA's Science Advisory Board found parts of the Dirty Water Rule proposal "in conflict with established science" and decrease "protection of our nation's waters." "The proposed definition of WOTUS is not fully consistent with established EPA-recognized science, may not fully meet the key objectives of the Clean Water Act—to restore and maintain the chemical, physical and biological integrity of the nation's waters—and is subject to a lack of clarity for implementation," the board wrote. As you know, the Trump Administration released a final version of the replacement rule in January that further rolled back protections for wetlands and streams, as the SAB predicted. Do you feel the advisory board's commentary should have had an impact on the final regulation? If not, what does you see is its purpose?

The EPA appreciates the work and advice of the SAB. Staff from the EPA Office of Water fully participated in informational and more formal meetings and teleconferences with SAB representatives at their request in advance of the issuance of the proposed rule (e.g., February 16, 2018 and May 31, 2018), after publication of the proposed rule (e.g., April 25, 2019), and during the SAB's public meeting in Washington, DC, on June 6, 2019.

As the EPA and the Army made clear in both the proposal and the final rule, the agencies' revised definition of "waters of the United States" is primarily guided by the statutory authority delegated by Congress under the Clean Water Act and the legal precedent set by key Supreme Court cases. The agencies are precluded from exceeding their delegated authorities to achieve specific policy, scientific or other outcomes. In the Clean Water Act, Congress explicitly directed the agencies to protect "navigable waters." The Navigable Waters Protection Rule regulates these waters and the core tributary system that provides perennial or intermittent flow to them. The agencies' definition of "waters of the United States" is informed by science, but science cannot dictate where to draw the line between federal and state or tribal waters, as those are legal distinctions established within the overall framework and construct of the Clean Water Act.

My understanding is many of the comments raised in the SAB's commentary were raised by public commenters as part of the public notice process on the proposed "Step 2" rule to revise the WOTUS definition, and if not already addressed in the proposal, are addressed in the final Navigable Waters Protection Rule and associated supporting materials.

14. The Science Advisory Board has questioned EPA's proposed rule with the National Highway Traffic Safety Information Agency, the Safer Affordable Fuel-Efficient Vehicles Rule or "clean cars" rule. Please explain how EPA is responding to the concerns raised by the SAB, so that we can have confidence that the Agency's actions are supported by science and are not arbitrary and capricious.

EPA and NHTSA have received hundreds of thousands of comments in response to the SAFE Notice of Proposed Rulemaking. The Agencies are reviewing and considering all comments made during the public comment period, including those submitted by SAB.

15. Last week, EPA Administrator Andrew Wheeler testified to the Chesapeake Bay Program being a "tremendous success" while backing a budget proposal to slash funding for the watershed by 90 percent.
 - a. If confirmed as Deputy Administrator, will you commit to ensuring the continued success of the Bay Program with the appropriations Congress ultimately provides on a bipartisan basis?

Yes.

- b. How will you support all watershed states' achievement of their nutrient reduction goals for clean water under the Chesapeake Bay TMDL?

We will continue to work in partnership with the Chesapeake Bay states on implementation of Watershed Implementation Plans, including ensuring that the requirements of the TMDL are reflected in state and/or federal permits. We will also work with nonpoint sources, in collaboration with other federal agencies and states, to find ways to reduce nonpoint sources of contribution to pollution that ultimately impacts the Bay. Finally, we will expend whatever dollars Congress appropriates so that they have the greatest positive impact to the Bay.

16. Will you negotiate in good faith with EPA's federal employees on use of facilities, official time, and grievance procedures?

Yes, EPA is in active negotiations with all six of our union partners over collective bargaining agreements. EPA is committed to negotiating in good faith and is looking forward to reaching agreements with EPA unions to the benefit of both staff and the American taxpayer.

- c. How do you see the relationship between these policies and agency morale?

While EPA does not have a specific tool to measure employee perspectives on policies related to the use of facilities, official time, and grievance procedures, we can use our past scores on the Federal Employee Viewpoint Survey (FEVS) to provide an indication of the relationship between these policies and agency morale. Certainly, our policies pave the pathway for our employee experiences as dedicated federal employees supporting our mission to protect human health and the environment. In that regard, we are committed to working with our unions, stakeholders and policy makers to support our diverse and talented staff.

Based on two FEVS questions of "How satisfied are you with the policies and practices of senior management?" and "Physical conditions (for example, noise level, temperature, lighting, cleanliness in the workplace) allow employees to perform their jobs well," along with the FEVS Employee Engagement Index* as proxies:

For the past four years, EPA's overall positive employee engagement score has remained steady and is comparable to the governmentwide engagement average. Agency results have been consistent in employee satisfaction with the policies and practices of their senior leaders as well as with physical workplace conditions. Thus, we have seen both measures hold steady over the past four years.

*** The Employee Engagement Index is a measure of the workplace conditions that lead to employees' willingness to exert discretionary effort in their jobs. The Index measures employees' views of their supervisors, their leaders, and their individual work experiences.**

- d. How does agency morale affect the agency's ability to protect public health the environment?

EPA uses Employee Engagement to help gauge employee morale. Research, such as that done by Gallup, has shown that engagement has a direct impact on business outcomes. Proactive employee engagement leads to greater productivity and quality, and is correlated with reductions in turnover, safety incidents, and absenteeism. Our ability to sustain positive employee engagement allows us to continue to protect public health and the environment, which is our core mission.

17. How do you account for the EPA's slow rate of completion of Superfund site remediation?

A site cleanup is complete when it is deleted from the NPL, not when construction of the remedy is complete. In FY 2019, EPA deleted all or part of 27 sites from the NPL, the largest number of deletions in one year since 2001. Under President Trump's leadership, EPA has been able to delete more contaminated Superfund sites off the NPL in his first three years than the entire Obama first term. Deletion from the NPL is an important milestone because it allows a site to be eligible for Brownfields grants and indicates to communities that cleanup is complete and protective of human health and the environment. Deleting sites from the NPL can help revitalize communities and promote economic growth by signaling to potential developers and financial institutions that cleanup is complete. Years, and sometimes decades, of complex investigation and cleanup work has gone into getting sites ready for deletion. The work on almost all Superfund sites can span administrations.

Over the past two years, EPA's Superfund Task Force worked to improve the Agency's implementation of the Superfund Program in order to accelerate cleanups and shorten the path to redevelopment and safe, productive reuse. EPA continues to implement the Task Force improvements and performance measures to track how those changes improve the Superfund Program.

Over the last three years, there has been a significant increase in the number of ongoing construction projects, demonstrating the large amount of field work that EPA is conducting.

As outlined above, cleaning up Superfund Sites has been and remains a top priority of this Administration. "Construction complete" means that all remedial

construction projects have been completed at the site but not that cleanup is complete. For example, many sites require one or more specific projects to address soil contamination and one or more projects to address groundwater contamination. “Construction complete” is only achieved once all projects have been constructed, installed, or otherwise implemented. Yet, this construction status does not mean the site cleanup is completed. For example, after a water treatment plant is constructed, it may operate for many years to treat the contaminated water.

Many of the sites currently on the National Priorities List (NPL) are very large, complex and technically challenging and often require numerous construction projects that are frequently phased in or sequenced over a span of years to clean up the site. The number of construction completions has declined over time as work on Superfund sites has reduced the number of sites with construction waiting to be completed and as more of the remaining sites have more significant and complicated work. The number of construction completions has dropped over Superfund’s 40-year history e.g. 1980s: average ~6 construction completions, 1990s: average ~63 construction completions, 2000s: average 41 construction completions, 2010s: average ~13 construction completions.

- e. What did you do to improve Superfund implementation as administrator of Region 8 and what would you expect to be able to do to enhance Superfund implementation as Deputy Administrator?

As Region 8 regional administrator, I took several steps to improve implementation of the Superfund program. The most important was meeting with an extraordinary group of career employees to evaluate the region’s sites and explore what was going well and what was not. I then visited sites where progress had been slow and met with state and local officials as well as communities. Working with career staff, we established timelines for completion (i.e. moving to delisting) and what needed to be done to reach that goal. For example, at the Colorado Smelter site, I asked for more money for cleanup. Working with then Deputy Administrator Wheeler, we found the money to accelerate cleanup at the residential operable unit by a decade or more, which will expediate the protection of families in that community. In Butte and Anaconda, Montana money was not an issue, goal setting was, career staff knew what steps were necessary to take to advance cleanup at these sites and working together we put together a plan to complete cleanup so that we could begin delisting at both sites by 2024 and 2025 respectively.

To put the answers more succinctly, what is generally necessary to advance cleanup is:

- Community support
- Consistent focus
- Clear direction to staff
- Being advocate for whatever is necessary to address sites where risk is the greatest

As deputy administrator, I will encourage the regions to use the framework articulated above. I will work with regions to accelerate safe cleanup of sites and be an advocate for their sites at EPA Headquarters/Program Offices.

18. Do you accept the latest findings of the U.S. Global Research Program Fourth National Climate Assessment and the Intergovernmental Panel on Climate Change, and do you think that the reports should provide a basis for federal policy?

I have read the reports and have no basis for disputing their findings.

- f. Do you agree with the following statements?

The scientific statements below are key findings from the Fourth National Climate Assessment that underwent public review and comment, interagency review, and expert review by the NAS.

- i. The key finding of the National Climate Assessment on Human Health: “Climate change threatens human health and well-being in many ways, including through more extreme weather events and wildfire, decreased air quality, and diseases transmitted by insects, food and water.”
- ii. The key finding of the National Climate Assessment on Infrastructure: “Infrastructure is being damaged by sea level rise, heavy downpours, and extreme heat; damages are projected to increase with continued climate change.”
- iii. The key finding of the National Climate Assessment on Water Supply: “Water quality and water supply reliability are jeopardized by climate change in a variety of ways that affect ecosystems and livelihoods.”

19. Do you think U.S. participation in the Paris Agreement helps or harms EPA’s ability to protect our environment?

The Agency continues to fulfill its statutory responsibilities including helping to implement multilateral environmental agreements to which the U.S. is a Party.

20. CEQ issued proposed revisions to NEPA regulations that would limit or eliminate analysis of climate change for fossil fuel projects. Do you think that environmental assessments of proposed major federal actions under the National Environmental Policy Act should take into account the project’s impact upon greenhouse gas emissions and climate change?

I commend CEQ’s efforts to comprehensively modernize its NEPA regulations – a task not done in 40 years. I recognize the important role EPA plays under NEPA in

reviewing and commenting on federal actions affecting the environment. I understand that CEQ is currently considering public comment on the proposed rule which include the degree of consideration greenhouse gases should receive as part of this review. I defer to CEQ for questions on their proposed rule.

Senator Cramer:

21. Mr. Benevento, I had the privilege of hosting a WOTUS roundtable with Administrator Wheeler in North Dakota last October. As you know as the former Region 8 Administrator, under the previous rule roughly 85 percent of my state's waters would have fallen under Federal jurisdiction. North Dakota found that totally unacceptable, successfully sued the Obama administration, and the 2015 rule was found illegal in federal court, a fact conveniently forgotten by many. Since the Administrator's visit, the EPA and Army Corps finalized the Navigable Waters Protection Rule. It is a marked improvement. However, as of your hearing date, the final rule had not been published in the Federal Register and therefore not in effect. With all the changes over the years, there is substantial uncertainty and confusion when the federal government makes jurisdictional determinations. I appreciate the good work that went into this final rule, but it is only good once it is in the Federal Register and once guidance has been distributed to those on the ground. With that in mind, when can we expect the final rule to be submitted in the Federal Register and how will you ensure that the intent of the rule is reflected in guidance?

I expect the final rule to be published in the Federal Register very soon. The final rule will take effect 60 days after publication. EPA recognizes the concern that may have raised regarding whether field implementation will ensure consistency with the test established in the Navigable Waters Protection Rule. I can assure you that any implementation guidance issued by the agencies will be consistent with the final rule.

22. Mr. Benevento, I appreciate the Trump Administration's position on cooperative federalism, including in the Regional Haze program. Administrator Wheeler released guidance in August 2019 to provide information about EPA's view of the discretion and flexibilities states have to develop Regional Haze state implementation plans. It seems like cost of compliance is only considered in dollars per pollutant reduction, but the cost of compliance can actually lead to plant closures. That seems like a steep price to pay for a visual improvement that is unnoticeable to the naked eye. Mind you, North Dakota is one of the few states that is in compliance with all of the National Ambient Air Quality Standards. I think in particular the electric industry has changed significantly and continues to do so since the last round of the Regional Haze program and that needs to be taken into account as well. First, is the Administrator's 2019 guidance the extent of the EPA's actions with regard to Regional Haze or are any further rulemakings or administrative actions being worked on? Second, please clarify whether Regional Haze was ever envisioned to put facilities out of business and to what extent cost of

compliance ought to be taken into account. Third, what flexibility can be provided to power plants and will you work with my constituents and the EPA Region 8 office to help provide it?

EPA finalized revisions to the Regional Haze Rule in January 2017 and released the final regional haze guidance document in August 2019. The regional haze guidance document supports key principles of program implementation for the second implementation period, including supporting states in developing State Implementation Plans (SIPs) for complying with the Clean Air Act's (CAA) visibility requirements; reducing state planning burdens; and leveraging emission reductions achieved through CAA and other programs that further improve visibility in protected areas. In addition, EPA continues to follow Administrator Wheeler's September 11, 2018, Regional Haze Reform Roadmap regarding the development of anticipated regulatory revisions and program implementation tools to help states develop approvable plans. We have publicly committed to undertake a notice-and-comment rulemaking, but we have not committed to a timeframe for revision of the Regional Haze Rule. We anticipate the rule revisions would substantively impact only the third and future planning periods.

The CAA identifies the cost of compliance as one of four factors that states must consider in determining whether emissions controls are necessary to make reasonable progress towards eliminating manmade visibility impairment in Class I areas. The other three factors are time necessary for compliance, energy and non-air environmental impacts, and remaining useful life of the source. The Regional Haze Rule, which implements these statutory requirements, does not mandate specific control decisions for specific sources. Rather, the Regional Haze Rule and the August 2019 guidance referenced above provide support for how states can undertake control measure analyses taking into consideration the four statutory factors for reasonable progress, which include cost of compliance. States have the flexibility to decide how to characterize the factors, but a state's approaches must be reasonable. Technically sound facts regarding costs, visibility benefits, and other factors will help states make well-reasoned decisions that are also technically sound.

The regional haze program is an iterative program that provides states with flexibility to develop a cohesive strategy that demonstrates reasonable progress over time. The August 2019 regional haze guidance is intended to provide information to states that they can then use in exercising their discretion in developing SIPs for the second implementation period. Importantly, there is no specified outcome or amount of emissions reduction or visibility improvement that is directed as the reasonable amount of progress for any Class I area. EPA's main goals in the near term are to support states in their SIP development processes and to provide technical and policy information for the upcoming second planning period. We want to support states' efforts and streamline the time and resources needed to meet the statutory and regulatory requirements under the regional haze program. EPA encourages states to discuss SIP development approaches with their EPA Regional office early in their process so that EPA can support states in the development of

approvable SIPs, including the analysis of potential emissions controls for power plants, where appropriate.

EPA is aware that in May of 2018, North Dakota sent letters to its power plants requesting that the facilities prepare four-factor analyses for their coal-fired electric generating units. Consistent with our Regional Haze Road Map, EPA recognizes that North Dakota has the lead role in implementing the Regional Haze Program, including in the review of the four-factor analyses and in determining any control measures necessary to achieve reasonable progress. In the spirit of collaboration and early engagement, our EPA Region 8 Office, working with EPA Headquarters, will continue to support the North Dakota Department of Environmental Quality in those efforts while respecting the flexibilities and discretion afforded to the states.

Senator Ernst:

23. There are currently 23 pending waiver petitions for 2019. Now that the administration is considering an appeal of this unanimous decision from the Tenth Circuit, can you commit to me that the EPA will not grant any of these pending 2019 small refinery exemptions until the legal action is settled?

This matter is currently in litigation, and we are not in a position to provide information on what future steps EPA will take on this matter.